

## THE BACK PAGE

### GRAVEL PITS: A ROCKY CONTROVERSY

By Joe Kolman  
Legislative Research Analyst

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Now, the mineral of contention is gravel.

There are statewide problems. Mine operators are frustrated that permits are not issued promptly. The Department of Environmental Quality, which approves operation and reclamation plans, acknowledges that deadlines have not been met, but it cites a lack of staff and other reasons for delays.

There are local concerns. Residents become enraged when a gravel pit—with its dust and noise—opens next door despite opposition. County officials often feel that ire because local governments, through zoning, may put conditions on pits and even forbid them in residential areas.

In recent months, flare-ups occurred in Missoula, Lewis and Clark, and Gallatin counties. The Water Policy Interim Committee and the Environmental Quality Council heard presentations on gravel pits during the interim. A legislative audit released last summer unearthed problems that have been festering for years.

"This is one of the major pinch points of the agency," DEQ Director Richard Oppen told the EQC last May.

Gravel pits will likely be much debated during the 2009 Legislature, touching on agency funding and regulation, local government powers, and other policy areas, such as public involvement and water.

### THE PERMITTING PROCESS

Gravel pits are so ubiquitous in the state—they are found near almost any road—that many Montanans may not even consider them mines, at least not compared to the likes of the Berkeley Pit.

Scores of gravel pits are not big enough to be regulated. Anything less than 10,000 cubic yards does not need a permit under the Opencut Mining Act, passed in 1973 to regulate the extraction of gravel as well as sand, bentonite, clay, and other materials.

There are about 2,000 active, permitted, opencut mines in the state, most of them for sand and gravel. They can vary in size from a small pit used by a county road crew to large commercial operations such as the pits that line Interstate 90 just west of Bozeman.

The DEQ is responsible for reviewing permit applications, setting and releasing reclamation bonds, and conducting inspections of opencut operations.

To get a permit, an opencut operator must ensure that:

- the area will be reclaimed for at least one specific use, such as pasture, residence, recreation, industry, or wildlife habitat;
- acid drainage or sedimentation will be prevented;
- soil will be salvaged and replaced;
- grading of the area is compatible with the post-mining use;
- waste buried onsite does not hurt water quality;
- roads will be located, constructed, and maintained in a manner that controls and minimizes erosion;
- open burning is conducted in accordance with suitable practices for fire prevention and control;
- archaeological and historical values are given appropriate protection;
- the area is revegetated, unless otherwise stipulated by the post mining use, and that seeding is done in a manner to prevent erosion;
- reclamation be done as concurrently as possible with the mining;
- surface water and ground water will be given appropriate protection, consistent with state law, from deterioration of water quality and quantity;
- noise and visual impacts on residential areas will be minimized to the degree practicable through berms, vegetation screens, and reasonable limits on hours of operation; and
- any other procedures necessary to prevent harm to the land, structure, improvements or life forms will be implemented.

While the DEQ Opencut Program is the lead agency in processing opencut mining permits, other entities also play a role. Air and water quality permits may be needed from the DEQ. The Department of Transportation weighs in on traffic impacts. Depending on how water is used and how much is used, a permit may be needed from the Department of Natural Resources and Conservation.

At the local level, county governments may prohibit gravel pits in areas zoned residential, and may place conditions on operations within other zoned areas. However, some of the

more controversial mines have been proposed in areas that are unzoned but have houses in the vicinity.

### A CHANGING LANDSCAPE

Jo Stephen steers her state-owned 1992 GMC Jimmy toward a gravel pit just outside Gallatin Gateway. Stephen is one of the DEQ's three full-time reclamation specialists for opencut mining. She and another specialist are based in Billings, the third is in Kalispell. For the most part, they are responsible for permitting about 100 new mines a year in addition to processing amendments to existing plans, inspecting mines, and checking on reclamation.

Stephen's territory runs roughly from Dillon to the North Dakota line.

In her eight years on the job, Stephen has seen a lot of gravel pits. She's also seen the landscape change. This particular mine in Gallatin County used to be surrounded by farm fields. Now, those fields are home to a crop of homes. Some of the owners don't like the noise, dust, or aesthetics of their industrial neighbor.

But industry officials are quick to point out that sand and gravel are needed for those new homes. While copper and gold sell for more by the ounce, sand and gravel are a key parts of the economy in Montana – especially in areas experiencing population growth where there are scads of new home foundations, driveways, and roads.

And gravel reserves are often located in alluvial valleys, which not surprisingly are often prime sites for new homes.

It is where these two land uses, gravel mining and residential development, intersect that controversies most often arise.

"That is about the time the gravel hit the fan," Opper told the EQC.

Homeowners near gravel pits are concerned about public safety, decreased property values, water contamination and availability, aesthetics, pollution from dust, noise, light, and increased truck traffic, according to the legislative audit.

These concerns may complicate the environmental reviews of opencut mines as required by the Montana Environmental Policy Act (MEPA). Public hearings are held for some applications, but not all. Stephen sees the impact in the amount of time she might spend on a single environmental assessment in Gallatin County versus a more rural area.

"It's like writing 50 of them in McCone County," she says.

### IN THE COURTS

For some mine operators, the DEQ took too long to approve opencut applications. And some counties, including Gallatin, were looking at implementing emergency zoning regulations to target gravel pits in previously unzoned areas.

The gravel miners went to court.

The Opencut Mining Act provides that once an application is received, the DEQ has 30 days to review the application, inspect the site, and notify the applicant if the application is acceptable.

According to law, an application is acceptable if, among other things, it meets the permit requirements stated above, includes a bond, and it complies with any applicable local zoning regulations.

After an applicant responds to any identified deficiencies, the DEQ has another 30 days to determine if the application is acceptable. The agency also may extend either or both of the 30 day periods for another 30 days for sufficient cause.

There are several court cases, but the Cameron Springs case in Gallatin County is illustrative of some of the problems. The DEQ found the Cameron Springs application acceptable in January 2008, but several months later still had not done the required environmental assessment (EA). The agency said the EA would take three months.

Although District Judge Jeffrey M. Sherlock expressed sympathy for the plight of the DEQ, he ruled in favor of the gravel pit operators.

In April, Sherlock wrote that the DEQ is "overworked and understaffed" and that while the statutory timelines may be unrealistic, the law required the agency to issue the permit once it was deemed acceptable. He ordered the permit to be issued. The DEQ complied, though Opper said he was uncomfortable skipping the required environmental review.

The ruling upset residents of the area.

They intervened in the case and asserted that the order issuing the permits would harm their property values as well as the environment in and around the proposed gravel pits. In general, the neighbors argued that the constitutional guarantee of a clean and healthful environment is implemented by MEPA. Therefore, if the pits are not complying with the environmental analysis required by MEPA, their constitutional rights are being violated.

In May, Gallatin County implemented interim zoning regulations for sand and gravel mines.

In August, Sherlock ruled that the neighbors may have a point, saying the law is not clear. He stayed the previous order that the permits be granted, though DEQ had already complied with it. Sherlock said the case may be decided by the Montana Supreme Court.

But this time, he was less kind to the DEQ. The judge noted that the agency appeared to be "doggedly refusing" to do anything to review the permits while citing a lack of staff--

even though the gravel operator offered to pay for the environmental analysis.

Opper said the agency did not put any more time into reviewing the permits because the judge ordered the permits issued. With a backlog of applications, Opper said it didn't make sense to review a permit that was already issued.

The case has been appealed to the Supreme Court, but it's unlikely that any decision would be reached before the 2009 Legislature concludes.

### AUDIT FINDINGS, DEQ RESPONSE

The court cases arose during the time the Opencut Mining Program, specifically the permitting process, was being examined by the Legislative Audit Committee. The audit findings included:

Improving file documentation. The department's official files were missing documentation necessary to issue an opencut mining permit.

Formalizing the permitting process. The department had an informal application process for permit applicants and department personnel, which can result in confusion among the regulated community and program staff.

Clarifying the department's role in processing applications. Although the department has a backlog of pending permit applications, program staff perform tasks beyond their statutory responsibilities, such as drafting application documents for mine operators.

Facilitating collection of the Resource Indemnity and Groundwater Assessment Tax. Not all opencut mine operators pay the tax, a primary source of program funding. While the Department of Revenue is responsible for collecting the tax, the Department of Environmental Quality can facilitate collection efforts by providing DOR with information about opencut mining activities.

Improving the management information system. DEQ does not collect enough information to effectively manage the Opencut Mining Program. Additionally, the department has not identified performance measures essential to a results-oriented management system.

Setting priorities for processing applications. Some applicants may have received preference when program personnel processed applications because there are no formal priorities for processing applications.

Clarifying public notification. Proposed opencut mines commonly generate public interest. However, state law does not require operators or the department to notify the public of proposed operations.

The audit also cited areas of concern outside of the scope of the audit.

The DEQ conducts limited monitoring of permitted mines. Because of limited resources, the agency says inspections are sparse; a mine may go for years without being inspected. The result is that bonds that are supposed to cover reclamation costs may be inadequate and operators may not be following the requirements of the permit.

While the purpose of the Opencut Mining Act is to ensure reclamation of opencut mines, the audit found a lack of enforcement. The audit found some cases where operators mined for extended periods without complying with the act, and, in one case, the DEQ did not initiate an enforcement action before the statute of limitations expired.

For the most part, the DEQ agreed with the findings of the audit. According to the agency, it has:

- developed comprehensive checklists of application components that can be used by applicants and DEQ reviewers, and has developed procedures to implement the checklists. The procedures aim to improve application quality, program and review quality, and timeliness.
- contracted with organizational specialists to evaluate the entire Opencut Program and identify areas of improvement and streamlining. The contractor will begin working with the department in mid-January 2009.
- met with Montana Association of Counties and Montana Contractors' Association to begin informing and training them on DEQ's new procedures.
- begun working with the Department of Revenue to share information.
- initiated database work to clarify data needs and data collection and storage procedures for better management of the program.
- started drafting an application review priority system which will allow for expedition of timely projects, such as highway construction efforts.

On the matter of staffing, the legislative auditors said they were unable to determine if the agency needed more staff. The DEQ has operated with the same number of staff for about 20 years, although the number and complexity of opencut mining applications has increased. In 2000, there were 59 permits issued, by 2006 the number had almost doubled. The auditors said a lack of program data as well as varied responsibilities among staff made it difficult to assess work load.

### OPENCUT MINING LEGISLATION

As of this writing, there are at least 15 bill draft requests that propose revising opencut mining laws and the DEQ is discussing legislation with lawmakers and interest groups.

There are few details so far about possible proposals, but several bills in prior sessions attempted to provide funding for the program and to deal with the controversy between residential development and mining.

In 2005, an annual fee on gravel pits was proposed that would have raised enough money for two full-time employees and another half-time employee. House Bill 361 died in the last days of the session.

Also in 2005, House Bill 591 was signed into law. It enhanced the powers of a county to regulate opencut operations. Prior to that session, 76-2-209, MCA, said:

"The complete use, development, or recovery of a mineral by an operation that mines sand and gravel and an operation that mixes concrete or batches asphalt on a site that is located within a geographic area zoned as residential are subject to the zoning regulations adopted under this chapter."

The 2005 changes said that sand and gravel operations could be "reasonably conditioned or prohibited" in any area zoned as residential by county commissioners. It further said:

"Zoning regulations adopted under this chapter may reasonably condition, but not prohibit, the complete use, development, or recovery of a mineral by an operation that mines sand and gravel, and may condition an operation that mixes concrete or batches asphalt in all zones other than residential."

In 2007, House Bill 557 attempted to limit what might be considered "residential" by requiring that in addition to the county definition of zoning, the land also had to be taxed as class four properties. The measure passed the House but died in the Senate.

A bill that generally revised the Opencut Mining Act passed, but it mostly focused on updating terminology and the process. It eliminated the one-time \$50 application fee, but another bill that would have established annual fees of up to \$600 failed.

Another 2007 proposal that died would have required that before a county implemented zoning regulations, the county prepare a report that identified sand and gravel resources in the area to be zoned.

#### FOR MORE INFORMATION

DEQ Opencut Mining Program:  
<http://www.deq.state.mt.us/opencut/Index.asp>

Legislative Audit of Opencut Mining Process:  
<http://www.leg.mt.gov/content/Publications/Audit/Report/08P-04.pdf>

Gallatin County Interim Zoning Regulations for Gravel Pits:  
[http://www.gallatin.mt.gov/public\\_documents/gallatincomt\\_plandep/uploadedpdfs/pd.final\\_signed\\_interim\\_reg.pdf](http://www.gallatin.mt.gov/public_documents/gallatincomt_plandep/uploadedpdfs/pd.final_signed_interim_reg.pdf)

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Gallatin County Interim Zoning Regulations for Gravel Pits:  
[http://www.gallatin.mt.gov/public\\_documents/gallatincomt\\_plandep/uploadedpdfs/pd.final\\_signed\\_interim\\_reg.pdf](http://www.gallatin.mt.gov/public_documents/gallatincomt_plandep/uploadedpdfs/pd.final_signed_interim_reg.pdf)